

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY DOWELL BAILEY,

Defendant-Appellant.

UNPUBLISHED

April 13, 2006

No. 258705

Wayne Circuit Court

LC No. 04-002932-01

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Defendant was convicted, following a jury trial, of three counts of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent terms of 427 months to 60 years for each of the armed robbery convictions, and 40 to 60 months for the felon-in-possession conviction, to be served consecutive to a 13 to 20-year term of imprisonment for the home invasion conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that he was deprived of a fair trial and his right to present a defense by the loss of potentially exculpatory physical evidence, and that his trial counsel was ineffective in failing to request an adverse inference instruction. We disagree.

We review a trial court's decision on a motion to dismiss for an alleged due process violation for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001). "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *People v Cress*, 250 Mich App 110, 155; 645 NW2d 669 (2002), rev'd on other grounds 468 Mich 678 (2003), quoting *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). Where evidence has been destroyed, the court should consider whether the destruction was deliberate, whether the evidence had previously been requested, and whether the defendant could have put the evidence to significant use. *People v Paris*, 166 Mich App 276, 283; 420 NW2d 184 (1988). Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. *People v Ricardo Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

After he was arrested, defendant was transported to the police precinct in a patrol car. Later, police found one of the victim's wallet under the seat cushion. The wallet was placed in evidence, but was later destroyed. The record contains no evidence concerning the destruction of the wallet, only that the destruction occurred on March 18, 2004. There is nothing in the record to indicate that bad faith was involved, and defendant makes no such claim. Nor does defendant claim that he requested the wallet. Further, there is no indication that this evidence was exculpatory. Under these circumstances, the trial court did not abuse its discretion in denying defendant's motion to dismiss. Additionally, we reject defendant's argument that defense counsel was ineffective in failing to request an adverse inference instruction based on the destruction of the wallet. Because there was no showing that the wallet was destroyed in bad faith, an adverse inference instruction was not appropriate. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Counsel is not required to make meritless requests. *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant next argues that he was denied due process and a fair trial by the trial's court failure to give an adverse witness instruction concerning Kathleen Horton, one of the alleged victims, and that counsel was ineffective in failing to object to the omission of the instruction. We disagree.

Because defendant did not preserve this issue by requesting an adverse witness instruction below, we review this issue for plain error affecting defendant's substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). A prosecutor who lists a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence. *Id.* If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness' testimony would have been unfavorable to the prosecution's case. *Id.*; see also *People v Perez*, 469 Mich 415, 420-421; 670 NW2d 655 (2003).

Because defendant did not preserve this issue by requesting an instruction below, he has the burden of establishing plain error (i.e., clear or obvious error). *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). He must therefore demonstrate that it is clear or obvious that there was a lack of due diligence in attempting to produce Horton. There is no basis in the record for concluding that due diligence was not exercised. The officer-in-charge testified at trial that he attempted to locate Horton three or four times but could not do so, and did not know her whereabouts. Thus, plain error has not been shown.

We also reject defendant's claim that defense counsel was ineffective for not requesting an adverse witness instruction. Defendant asserts that Horton's presence was essential to his defense because his theory was that Horton and others committed the offenses, and that he came to the scene as they were fleeing. Defendant so testified at trial, and argues that his testimony would have been buttressed by an adverse witness instruction. Defendant's claim fails.

First, considering that defendant was charged with an additional count of armed robbery involving Horton, and that defense counsel was successful in having that charge dismissed in its entirety when Horton could not be produced, it is not apparent that defense counsel was ineffective for failing to further pursue the issue of Horton's absence by requesting an adverse

witness instruction. Second, without any basis in the record for concluding that there was a lack of due diligence in attempting to secure Horton's presence, defendant cannot demonstrate that an adverse witness instruction would have been warranted had it been requested. Counsel is not required to make futile requests or objections. *Torres, supra*. Third, Horton's failure to testify was consistent with defendant's assertion that she was involved in the offense, although it did not establish that defendant was not himself involved. It is unlikely that had the jury been given the adverse inference instruction, it would have, on the basis of that instruction, rejected the complainants' testimony and believed defendant's.

Defendant next argues that there was insufficient evidence to support his conviction of the armed robbery involving Patricia McGhee. We disagree.

In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

The elements of armed robbery are (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. The prosecutor need not show that the victim actually owned the property taken. Rather, the prosecutor need only show that the property was taken in the victim's presence and that the victim's right to possess the property was superior to the defendant's right to possess it. *People v Rodgers*, 248 Mich App 702, 707, 711-712; 645 NW2d 294 (2001). It is sufficient if the property taken belongs to someone other than the thief. *Id.* at 712.

Patricia McGhee testified that she left her house and encountered defendant, who was armed with a gun. Defendant instructed her to return to the house and then followed her inside, demanding that she tell him the location of some money and a safe. While she was still inside, defendant searched the house and took her husband's watch and pistols. Viewed in a light most favorable to the prosecution, this testimony was sufficient to show that defendant assaulted Patricia McGhee while armed with a gun, stole property belonging to McGhee's husband in McGhee's presence, and that McGhee had a greater right to the property than defendant. Accordingly, there was sufficient evidence to support defendant's armed robbery conviction involving Patricia McGhee.

In a brief filed in propria persona, defendant argues that reversal is required because the prosecutor withheld exculpatory fingerprint evidence in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt concerning the defendant's guilt. *Id.* at 87; *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

In support of his claim that there was favorable fingerprint evidence collected at the crime scene, defendant points only to testimony establishing that evidence technicians were present at the crime scene, and that the prosecutor remarked in his opening statement that defendant personally robbed Patricia McGhee but then argued in summation that defendant gave orders to others instead. But neither of these matters suggest that the prosecution possessed fingerprint evidence that was favorable to defendant, i.e., fingerprints belonging to persons defendant alleged had committed the offenses. In fact, defendant points to no evidence establishing that the evidence technicians even recovered fingerprints. Thus, the record does not support's defendant's *Brady* violation claim.

Further, because there is no indication that any fingerprint evidence even existed, let alone any fingerprint evidence that was favorable to defendant, defendant has not shown that defense counsel was ineffective for failing to raise this issue. Again, counsel is under no obligation to raise meritless arguments. *Torres, supra* at 425.

We find no merit to defendant's additional ineffective assistance of counsel claims. To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient, and he must further show that the deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The record does not support defendant's claim that defense counsel failed to file or make appropriate motions.

Next, contrary to what defendant argues, it was not improper for the prosecutor to comment on defendant's failure to call corroborating witnesses. The remarks were proper comment on the credibility of the defense theory advanced at trial. See *People v Fields*, 450 Mich 94, 112-115; 538 NW2d 356 (1995). Likewise, the prosecutor's remark in closing argument that defendant was the person who came to the Oil Dispatch store looking for Robert McGhee was a reasonable inference based on the evidence presented and, therefore, was not improper. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Accordingly, defense counsel was not ineffective for failing to object to the prosecutor's remarks. *Torres, supra* at 425.

Next, defendant has not overcome the presumption that defense counsel declined to call additional witness as a matter of trial strategy. *People v Rockney*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Lastly, defendant's claims that defense counsel advised him to plead guilty and failed to obtain proper attire for him at trial do not provide grounds for reversal. Defendant had a full trial, therefore counsel advice is irrelevant. Further, defendant explained to the jury why he was wearing what he felt were dirty clothes. We are confident that defendant's attire had no effect on the outcome of the trial.

Defendant also asserts that he is entitled to a new trial because the trial court's conduct demonstrated bias against him. We disagree.

We must review the record as a whole to determine whether the trial court's conduct pierced the veil of judicial impartiality. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). The veil of judicial impartiality is pierced when the court's comments or conduct "unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Id.*

The fact that the trial court elected to give its own jury instruction on aiding and abetting, rather than use the standard jury instruction, does not demonstrate that the trial court pierced the veil of judicial impartiality. Trial courts are not required to use the Michigan Criminal Jury Instructions. *People v McFall*, 224 Mich App 403, 414; 569 NW2d 828 (1997). While the trial court's aiding and abetting instruction failed to sufficiently convey the intent element of aiding and abetting, *Carines, supra* at 757; *People v Smith*, 87 Mich App 584, 594; 274 NW2d 844 (1978), this error was harmless. The principal issue at trial concerned the victims' identity of defendant as one of the perpetrators. Additionally, there was overwhelming evidence establishing defendant's guilt of the charged crimes. In these circumstances, it is not more probable than not that the trial court's failure to sufficiently instruct on the intent element of aiding and abetting affected the outcome. *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002).

The trial court's comments to the jury when responding to the jury's questions during deliberations were facially neutral; they do not reflect impartiality and were not calculated to unduly influence the jury against defendant.

The additional remarks by the trial court of which defendant complains were made either outside the presence of the jury, or after the jury announced its verdict and, therefore, could not have influenced the jury's adverse verdict against defendant.

For these reasons, we reject defendant's claim that a new trial is required because of judicial misconduct.

Affirmed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Alton T. Davis